Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-256

JOHN HEY, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA,

Petitioner,

vs.

STATE EX REL. CLETUS B. HANLEY, PROSECUTING ATTORNEY OF KANAWHA COUNTY, WEST VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

The respondent, State ex rel. Cletus B. Hanley, Prosecuting Attorney of Kanawha County, West Virginia, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Supreme Court of Appeals of West Virginia's judgment in this case. That judgment is reported at 255 S.E.2d 354 (1979).

QUESTIONS PRESENTED

I. Whether a probationer's due process rights are violated if his probation status is revoked upon determination of the commission of a subsequent felony.

II. Whether a probationer's interests are sufficiently represented and protected by the presence and participation of his counsel in a proceeding to review the legality of his probation status.

STATEMENT OF THE CASE

On September 19, 1977 Gregory Dale O'Scha plead guilty to a felony charge and was placed on probation for a period of two years by the Honorable John Hey, Judge of the Circuit Court of Kanawha County, West Virginia. Subsequently, O'Scha received written notice from probation authorities that sought to revoke his probation on grounds that he had violated the terms of his probation by committing another felony. O'Scha was represented by counsel, Marvin W. Masters, at the preliminary and final revocation proceedings. At the final revocation hearing, the trial court entered an order revoking probation based on a plea of guilty to the charge of violating the terms of his probation by committing a second felony. On August 30, 1978 Judge Hey ordered that the sentence imposed on petitioner on September 19, 1977, be carried out. O'Scha was then incarcerated to serve the indeterminate sentence of not less than one (1) year nor more than ten (10) years.

Probationer's counsel, Marvin W. Masters, made a timely Motion for Reconsideration of the sentence of the Kanawha County Circuit Court. Such motion was granted on October 11, 1978 by the petitioner Judge. On October 24, 1978 Judge Hey ordered Gregory Dale O'Scha released from incarceration and placed O'Scha on probation for a period of five (5) years, over objection of the respondent. It was the respondent's position that the petitioner was prohibited from doing so by the terms of

West Virginia Code, Chapter 62, Article 12, Section 10 of 1931, as amended.

The respondent presented a petition for Writ of Prohibition to the Supreme Court of Appeals of West Virginia praying the court to issue a rule restraining and prohibiting petitioner from suspending the sentence imposed on O'Scha and placing O'Scha on probation. The rule was issued and briefs were submitted by respondent and by O'Scha's counsel below, Marvin W. Masters. After oral argument was had, wherein petitioner's counsel, Marvin Masters, appeared before the Supreme Court of Appeals of West Virginia, that Court issued a Writ of Prohibition as prayed for by the respondent.

ARGUMENT

I. THE SUPREME COURT OF APPEALS OF WEST VIRGINIA FULLY CONSIDERED PETITIONER'S ARGUMENTS AND CORRECTLY DECIDED, UPON THE FACTS OF THE CASE, TO ORDER A WRIT OF PROHIBITION AS PRAYED FOR BY RESPONDENT.

The revocation of probation proceedings in the instant case were structured and conducted in compliance with all the requirements and guidelines established by this Court and the Supreme Court of Appeals of West Virginia. *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); *Louk v. Haynes,* 223 S.E.2d 780 (W.Va 1976); *Dobbs v. Wallace,* 201 S.E.2d 914 (W.Va. 1974). Any person awarded probation in West Virginia may continue to enjoy that more lenient corrective process so long as the convicted person does not subsequently commit a felony. West Virginia Code 62-12-10 clearly and unambiguously delimits the discretion to be employed by any hearing officer or judge when

determining whether probation should be continued where a term of that probation has been violated. Section 10 reads in pertinent part:

> "If at any time during the period of probation there shall be reasonable cause to believe that the probationer has violated any of the conditions of his probation, the probation officer may arrest him with or without an order or warrant, or the court which placed him on probation, or the judge thereof in vacation, may issue an order for his arrest, whereupon he shall be brought before the court, or the judge thereof in vacation, for a prompt and summary hearing. * * * If, despite a violation of the conditions of probation, the court or judge shall be of the opinion that the interests of justice do not require that the probationer serve his sentence, the court or judge may, except when the violation was the commission of a felony, again release him on probation. (1939, c. 27, § 10; 1955, c. 41.) West Virginia Code 62-12-10.

If a probationer does commit a subsequent felony, the law states that the individual serve the sentence imposed by the conviction of the first felony. The final revocation hearing is dispositive of whether the probationer did commit a felony as charged.

In *State ex rel. Winter v. MacQueen,* 239 S.E.2d 660 (W.Va. 1977), the court discussed West Virginia Code, Chapter 62, Article 12, Section 2. Section 2 sets forth those instances wherein a sentencing judge may grant probation. The sentencing court in *MacQueen* placed the convicted felon on probation despite the fact that he had been adjudged guilty of a prior felony within less than five (5) years.

Section 2 unequivocally provides, in pertinent part, that:

> "All persons who have not been previously convicted of a felony within five years from the date of the felony for which they are charged, and who are found guilty of or plead guilty to any felony, the maximum penalty for which is less than life imprisonment * * * shall be eligible for probation * * *." Code 62-12-10.

The West Virginia Supreme Court of Appeals reversed the lower court, pointing out that judicial discretion in the matter of probation in such a case is proscribed by legislative fiat. As the language was clear and unambiguous, "said statute must be applied, not construed." 239 S.E.2d at 661. The statute was found to be constitutionally sound. *Id.* at 662. The court noted further, in the concurring opinion, that the Legislature has the broad right to define crimes and their punishment subject to certain constitutional limitations. *Id.* at 663. It then went on to state:

> "A study of the authorities relied upon by Chief Justice White in *Ex parte United States, Petitioner,* [242, U.S. 27, 44, 37 Ct. 72, 75, 61 L. Ed. 129 (1916)], particuliarly 2 Hale, *Pleas of the Crown* 412 (1st American ed. 1847), and 4 Blackstone, *Commentaries of The Laws of England* (1803), convinces me that courts possess no inherent power to place a defendant on probation." *Id.* at 663.

The court properly relied upon its discussion of Section 2 in *MacQueen, supra,* in considering Section 10 in light of the present facts. As is apparent on the face of Section 10, the circuit court had to remand probationer to the custody of the State after he admitted with counsel that he had subsequently committed a felony. This Court has implicitly recognized that the voluntary admission of the commission of a felony may be grounds for withdrawal of probation. *Gagnon v. Scarpelli, supra* at 787.

A revocation decision, as stated in *Morrissey v. Brewer,*

408 U.S. 471, 479-480, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), has two analytically distinct components: whether the alleged probation violation occurred and if so, whether such infraction undermines the intended rehabilitative purpose of the probation. Pursuant to its almost plenary powers under Article VI, Section 1 of the West Virginia Constitution; see *State v. Dent*, 25 W.Va. 1 (1884), *aff'd*, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889), the West Virginia Legislature has determined that the commission of a second felony would negate any intended beneficial effects of probation and has mandated that probation be uniformly withdrawn in such instances. This legislative decision is constitutional.

The probationer O'Scha admitted that he was guilty of violating the terms of his probation by committing a felony. In the face of this voluntary admission of guilt, the Supreme Court of Appeals of West Virginia correctly decided that O'Scha's probation revocation was required by law.

II. THE DECISION OF *STATE EX REL. HANLEY v. HEY*, 255 S.E.2d 354 (W.Va. 1979), TURNS UPON ITS OWN FACTS AND AFFECTS FEW OTHERS, IF ANY, BESIDES THE LITIGANTS.

A general rule in prohibition proceedings in West Virginia is that any person whose rights may be affected by the issuance of a writ must be made a party and must be given notice of the proceedings. *State ex rel. Partain v. Oakley*, 227 S.E.2d 314 (W.Va. 1976). The court recognized this rule in its opinion in the instant case. 255 S.E.2d at 356. The court also recognized that the probationer O'Scha and the petitioner had identical interests in the proceedings before the State Supreme Court. Furthermore, Marvin W. Masters, O'Scha's counsel in the

probation revocation hearings, answered, briefed, and argued the case below on behalf of the petitioner. The court found that O'Scha had actual notice of the proceedings and that his interests were adequately represented by his counsel. The court held that, under these unique circumstances, the general rule was not controlling and issued the Writ of Prohibition.

The presence of counsel has repeatedly been the crucial element in decisions involving the equal protection and due process afforded criminal defendants. See *Argensinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967); *Hamilton v. Alabama*, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961); *Stepheney v. United States*, 516 F.2d 7 (4th Cir. 1975); *Louk v. Haynes, supra*. The actual presence of an unnamed party's counsel cannot be seen as a denial of due process or equal protection if the unnamed and named parties interests are identical in fact and in law. Due to the limited nature of the decision below and the special factual circumstances, the West Virginia Supreme Court of Appeals properly granted an exception to the general rule.

Probationer O'Scha and his counsel, Marvin W. Masters, appeared at the revocation hearing. O'Scha, upon advice of counsel, plead guilty to the charge of violating the terms of his probation. Petitioner is engaging in a battle of semantics to argue that he did not plead guilty to the charge of committing a felony when he had written notice of the charge and such charge was the basis of the revocation proceedings. Because there were no facts in dispute, the State Supreme Court was asked to decide solely a question of law—the meaning of the clear and unambiguous words of West Virginia Code, Chapter 62, Article 12, Section 10. The court properly saw no merit

in petitioner's argument that a probationer be subjected to a criminal trial and the possibility of further punishment upon conviction in order to assure due process in the revocation of probation.

In the presence of counsel, the probationer knowingly and willingly admitted he violated the terms of his probation by the commission of a felony. The petitioner acted in contravention of West Virginia Code 62-12-10 by placing O'Scha on probation. The respondent petitioned the State Supreme Court to order petitioner to comply with State law. The Supreme Court of Appeals of West Virginia so ordered.

CONCLUSION

For the foregoing reasons, respondent submits that the Petition for Writ of Certiorari should be denied and that the order of the Supreme Court of Appeals of the State of West Virginia should thereby be affirmed.

Respectfully submitted,

STATE EX REL. CLETUS B. HANLEY,
Prosecuting Attorney of Kanawha
County, West Virginia,
Respondent

By Counsel

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Charleston, West Virginia 25305

Counsel for Respondent

CERTIFICATE OF SERVICE

I, Chauncey H. Browning, one of counsel for the respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 28th day of September, 1979, I served three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari on the petitioner by hand delivering the same to counsel of record for the petitioner, Marvin W. Masters, 416 Peoples Building, Charleston, West Virginia. I further certify that all parties required to be served have been served.

Chauncey H. Browning

CHAUNCEY H. BROWNING